No. 93-799

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MOTION FILED
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STANDARD INSURANCE COMPANY,
Petitioner,
v.
JEROME SAKLAD,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Oregon

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.2 of the Rules of this Court, the Health Insurance Association of America ("HIAA") hereby moves for leave to file the attached brief *amicus curiae* in support of the petition filed by Standard Insurance Company. Petitioner has consented to the filing of this brief. Although respondent has not opposed the filing of this brief, HIAA has been unable to contact him directly to obtain his formal consent.

There are two good reasons why this Court should accept HIAA's brief in addition to the petition. As an organization that represents the interests of more than

250 insurance companies in the United States,[1] HIAA offers this Court a uniquely broad view of the practical impact of the Oregon Court of Appeals' decision and the conflict in authority concerning whether ERISA[2] pre-empts provisions like the Oregon garnishment exemption at issue in this case. In particular, HIAA's brief focuses on the insurance industry's ongoing struggle to contain costs in the face of enormous losses caused by fraud. HIAA emphasizes the risk that such efforts will be thwarted by decisions like the Oregon Court of Appeals' ruling in this case, which deprives benefit plans of what is often the only effective means of enforcing judgments against defrauders like respondent.

Additionally, HIAA's brief discusses an Eleventh Circuit decision[3] issued since the petition was filed that conflicts with the Oregon Court of Appeals' decision in this case and further demonstrates the need for this Court to clarify the bounds of ERISA pre-emption.

For these reasons, HIAA requests leave to file the attached brief *amicus curiae*.

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[1] HIAA is a non-profit trade association whose members provide approximately 70 percent of the fully-insured commercial health insurance in the United States. Most of the policies issued by HIAA's members are provided to or through employee benefit plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA").

[2] Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*

[3] *Schlein* v. *Mills*, 1993 WL 468513 (CA11 Dec. 2, 1993).

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

The Health Insurance Association of America ("HIAA") is a non-profit national trade organization formed to advance the interests of the more than 250 insurance companies it represents. These companies provide approximately 70 percent of the fully-insured commercial health insurance in the United States, providing health care coverage to over 65 million Americans. Most of the policies issued by HIAA's members are provided to or through employee benefit plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA").

HIAA's interest in the decision below is direct and substantial. Health care fraud like that perpetrated by

the respondent in this case is unfortunately common and costly.[1] If benefit plan sponsors are unable to enforce judgments against those who defraud them, the enormous burden of health care fraud [2] will be borne by plan beneficiaries in the form of increased premium costs or reduced benefits.

HIAA is also affected by the lack of uniformity in the law governing whether a defrauded benefit plan can obtain restitution from the defrauder, which is highlighted by this case. Because the Oregon Court of Appeals' decision in this case conflicts with the Tenth Circuit's recent ruling in *Guidry* v. *Sheet Metal Workers International Association*, 1993 WL 444979 (Nov. 4, 1993) and the Eleventh Circuit's decision in *Schlein* v. *Mills*, 1993 WL 468513 (Dec. 2, 1993), the ability of benefit plans to enforce judgments against those who have defrauded them is different in Oregon than it is in Colorado and Florida. Further, the rationale underlying the Oregon court's ruling on the bounds of ERISA pre-emption is in substantial tension with the position on this issue taken by a number of other courts.[3] In light of these differing views, it is at

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[1] Health Insurance Association of America, *Preventing and Controlling Health Insurance Fraud* (Jan. 1991), p. 1 (noting the estimate that health insurance fraud in 1990 constituted a 10 percent surcharge of $55 billion to the annual national cost of health care).

[2] See General Accounting Office, GAO/HRD 92-69, *Report to Chairman, Subcommittee on Human Resources and Intergovernmental Relations, Committee on Government Operations, House of Representatives* (May 1992), p. 1 (noting the common estimate that losses resulting from fraud and abuse account for 10 percent of current health care spending and that health care spending is expected to reach $1 trillion by 1995).

[3] See *CSCAC* v. *El Capitan Development Co.*, 53 Cal.3d 1041, 282 Cal. Rptr. 277, *cert. denied*, 112 S. Ct. 430 (1991); *Iron Workers Pension Fund* v. *Terotechnology*, 891 F.2d 548 (CA5), *cert. denied*, 497 U.S. 1024 (1990). The petition discusses these cases at pages 11-13.

best uncertain whether a benefit plan could collect judgments in those States in which exemption provisions like the one at issue in this case have not been reviewed for ERISA pre-emption.[4] This disparity in state laws will generate increased administrative costs, because benefit plans will have to comply with varying provisions governing the collection of fraud judgments.

REASONS FOR GRANTING THE PETITION

The petition presents a classic case for this Court's intervention. The lower courts are confused about two aspects of this Court's ruling concerning the scope of ERISA pre-emption in *Mackey* v. *Lanier Collection Agency*, 486 U.S. 825 (1988); both are presented in the petition. Relying on language from *Mackey*, the Oregon Court of Appeals ruled in this case that ERISA does not pre-empt a state-law provision exempting ERISA plan benefits from garnishment because (1) the exemption is not limited to ERISA benefits; and (2) this Court has tacitly held that generally applicable exemptions from garnishment are not pre-empted by ERISA. This reading of *Mackey* conflicts squarely with the recent Tenth Circuit decision in *Guidry* and Eleventh Circuit ruling in *Schlein*, is inconsistent with this Court's ERISA precedent, and is contrary to the policy and purpose underlying ERISA's pre-emption provision.

In addition to satisfying these traditional criteria for certworthiness, this case offers the Court a particularly

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[4] Provisions exempting plan benefits from garnishment exist in a variety of forms in most states. A sampling of these statutes reveals both the "patchwork" of state laws relating to garnishment exemptions and the need for uniformity. See, *e.g.*, Conn. Gen. Stat. § 52-352b(e) (1993); Idaho Code § 41-1834 (1993); Iowa Code § 627.6(8)(c) (1993); La. Rev. Stat. Ann. § 22:646 (1993); Me. Rev. Stat. Ann. tit. 14 4422(13)(c) (1993); Mich. Comp. Laws § 600.6023(f) (1993); Minn. Stat. § 550.39 (1993); Miss. Code Ann. § 85-3-1(b)(ii) (1991); N.J. Rev. Stat. § 17B-24-8 (1993); Pa. Cons. Stat. Ann. tit. 42 § 8124(c)(7) (1993); S.C. Code Ann. § 15-41-30(10)(c) (1991); Tenn. Code Ann. § 26-2-110(a) (1993).

good vehicle for resolving the evident confusion concerning what this Court held in *Mackey* concerning the bounds of ERISA pre-emption. The issues presented are well-defined and free of procedural problems, and the facts and governing law are undisputed. There is no ostensible benefit to be gained by allowing these issues to "percolate" any longer in the lower courts: the split in authority on the meaning of *Mackey* is established and unlikely to resolve itself. By taking this case and clarifying two points in *Mackey*, this Court would eliminate this confusion speedily.

Beyond resolving the conflicting decisions regarding the meaning of *Mackey* and the scope of ERISA pre-emption, granting the petition and reversing the decision of the Oregon Court of Appeals would further the public interest in two related ways. First, a ruling that ERISA pre-empts antigarnishment provisions like that at issue in this case would mean that a defrauded benefit plan could use existing state-law garnishment procedures to satisfy judgments against the defrauder and thereby offset the burden caused by health care fraud. Second, a ruling ensuring the uniform availability of such procedures would avoid a "patchwork" of conflicting state laws and the accompanying administrative burdens on benefit plans and benefit providers like HIAA's members.

I. MACKEY DOES NOT REQUIRE A STATE STATUTE TO MENTION ERISA BY NAME IN ORDER TO BE PRE-EMPTED.

Mackey v. *Lanier Collection Agency*, *supra*, addressed whether a creditor could enforce a series of judgments by garnishing certain benefits from the debtors' vacation and holiday benefits plan, which was an "employee welfare benefit plan" under ERISA § 1002(1). Georgia law established generally applicable garnishment procedures but exempted from garnishment "[f]unds or benefits of [an] . . . employee benefit plan or program subject to . . .

[ERISA]." Ga. Code Ann. § 18-4-22.1 (1982). This Court ruled that the antigarnishment provision was pre-empted under ERISA § 514(a) because it "relate[d] to" an employee benefits plan. 486 U.S., at 829-30. In discussing why the antigarnishment exception was pre-empted while the general garnishment scheme was not, the Court provided the following explanatory footnote—which apparently has given rise to confusion regarding the scope of ERISA pre-emption:

> "It is not incongruous to find that Ga. Code Ann. § 18-4-20 (Supp. 1987), which provides for garnishment of ERISA welfare benefit plans, escapes pre-emption under ERISA, while striking down § 18-4-22.1—an exception to the general state-law provision—as pre-empted. While we believe that state-law garnishment procedures are not pre-empted by § 514(a), we also conclude that *any* state law which singles out ERISA plans, by express reference, for special treatment is pre-empted. . . . It is this 'singling out' that pre-empts the Georgia antigarnishment exception." *Mackey*, 486 U.S., at 838, n.12 (emphasis in original).

In an apparent misunderstanding of the Court's reasoning in *Mackey*, the Oregon Court of Appeals held that the antigarnishment exemption at issue in this case did not "relate to" an ERISA plan—and therefore was not pre-empted by ERISA--because it was not limited to ERISA-covered plans, even though there was no dispute that the exemption applied to benefits derived from plans covered by ERISA. Pet. App. 3. This analysis is contrary to this Court's ERISA pre-emption precedent, which holds that a state statute can be pre-empted by ERISA in any of *three* ways. First, a statute is pre-empted if—as was true in *Mackey*—it refers to ERISA plans directly. Second, a statute is pre-empted if it refers to plans that are covered by ERISA without mentioning ERISA directly. See *FMC Corp.* v. *Holliday*, 498 U.S. 52, 58 (1990); *Mackey*, 486 U.S., at 831. Third, a statute is

pre-empted if it has a "connection with" a plan covered by ERISA, *i.e.*, if the ERISA plan is affected by the statute at issue "even if the law is not specifically designed to affect such plans, or the effect is only indirect." See *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 139 (1990).

The Oregon Court of Appeals apparently understood *Mackey* as limiting the pre-emptive scope of ERISA to statutes that "single out" ERISA by name. Pet. App. 3. As such, the Court of Appeals conducted only one-third of the pre-emption analysis required by this Court's precedent and missed the point of *Mackey*. Other courts have adopted a similarly erroneous view of the Court's holding in *Mackey*.[5]

A different view of *Mackey*—one consistent with this Court's precedent—is that the Court included the footnoted language quoted above to explain why the particular antigarnishment exemption in *Mackey* was pre-empted, and not to repudiate the alternative bases for pre-emption under the Court's ERISA cases. In accord with this interpretation of *Mackey*, the Tenth Circuit in *Guidry* found that a Colorado antigarnishment exception was pre-empted by ERISA § 514(a) although the exemption refers only to the " 'avails of any pension or retirement benefits, or deferred compensation plan,' " and—like the Oregon exemption at issue in this case—does not mention ERISA specifically. Similarly, the Eleventh Circuit recently ruled in *Schlein* that ERISA pre-empted a Florida garnishment exemption[6] although the "statutory language of [the ex-

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[5] The petition discusses these cases and their various constructions of *Mackey* at pages 20-21.

[6] The Eleventh Circuit ruled that the Florida exemption, though pre-empted by ERISA § 514(a), fell within the § 514(d) exception to pre-emption. 1993 WL 468513, at *10. The *Schlein* court's discussion of § 514(a) is what is relevant for purposes of analyzing the split in authority that HIAA and petitioner have asked this Court to resolve.

emption provision] does not expressly mention ERISA." 1993 WL 468513, at *5. The *Schlein* court found that the exemption "related to" ERISA because benefit plans covered by ERISA fell within the exemption's scope. *Ibid.*

This Court should grant the petition to resolve this split in authority and clarify that nothing in *Mackey* was intended to abrogate this Court's holdings that § 514(a) of ERISA pre-empts any state law that refers to ERISA plans directly or indirectly, or substantively affects such plans.

II. MACKEY DOES NOT EXEMPT EVERY STATE-LAW PROVISION RELATING TO GARNISHMENT FROM ERISA PRE-EMPTION.

This Court recognized in *Mackey* that general state-law garnishment mechanisms are not pre-empted by ERISA because they are necessary to give effect to the "sue and be sued" provision of ERISA (§ 502(d)), because Congress "remain[ed] silent" though it was aware welfare benefits could be garnisheed, and because such mechanisms are merely "procedural" [7] in nature. 486 U.S., at 833-38.

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[7] The Court carefully limited the scope of its ruling that Georgia's general garnishment procedures were not pre-empted:

> "We note . . . that under Georgia law (at least), garnishment is a 'procedural' mechanism for the enforcement of judgments. Georgia's statute that provides for garnishment creates no substantive causes of action, no new bases for relief, or any grounds for recovery; the Georgia garnishment law does not create the rule of decision in any case affixing liability. Rather under Georgia law, postjudgment garnishment is nothing more than a method to collect judgments *otherwise* obtained by prevailing on a claim against the garnishee. See Ga. Code Ann. § 18-4-60 (1982)." *Mackey*, 486 U.S., at 835, n.10 (emphasis in original).

In rejecting petitioner's pre-emption argument in this case, the Oregon Court of Appeals collapsed—and thereby distorted—this Court's analysis in *Mackey*:

> "We understand *Mackey* to mean that the congressional silence concerning garnishment of ERISA welfare plans acknowledged and accepted various state practices concerning garnishment, *including the practice of refusing garnishment*." Pet. App. 3 (emphasis added).

By focusing only on the "congressional silence" aspect of this Court's reasoning in *Mackey*, the Oregon Court of Appeals reached the anomalous conclusion that the Oregon antigarnishment provision survived ERISA pre-emption even though—in direct contrast to the general garnishment procedures upheld in *Mackey*—this provision frustrated ERISA's "sue and be sued" provision and had a *substantive* impact on a plan's ability to enforce a judgment. In this case, respondent was able to use the Oregon antigarnishment provision at issue to prevent an ERISA plan fiduciary from recouping losses the plan suffered because of respondent's fraud. Thus, although petitioner was able to sue respondent under ERISA's civil enforcement provision and obtain a judgment against him, the judgment was robbed of effectiveness by the Oregon antigarnishment provision. Respondent was able to resist the force of the judgment against him because of the substantive "right" to relief created by the Oregon antigarnishment provision. This is the type of conflict with state law that ERISA's broad pre-emption provision was intended to eliminate.

This Court's ruling in *Mackey* that Georgia's general garnishment procedures were not pre-empted by ERISA was careful and deliberately narrow. The Court noted that whether these provisions were pre-empted was a "complex" and "close" question, 486 U.S., at 830-31, and took care to explain that the provisions withstood pre-emption only because they satisfied each of the three

criteria set forth above. Although some courts have been sensitive to the distinctions this Court drew in *Mackey*,[8] others—like the Oregon Court of Appeals in this case—have not. By reading *Mackey* as permitting all provisions of the Oregon garnishment statute to be classified as "procedural"—and thus not pre-empted—the Oregon Court of Appeals restricted the scope of ERISA pre-emption in a way that is inconsistent with this Court's settled precedent and the purpose of ERISA's pre-emption provision. This Court should grant the petition to clarify the distinction drawn in *Mackey* between purely procedural state-law mechanisms that are not pre-empted by ERISA and state laws that have a substantive impact on ERISA benefit plans and therefore fall within ERISA's pre-emptive scope.

III. CLARIFYING MACKEY WILL FURTHER THE POLICIES UNDERLYING ERISA PRE-EMPTION AND WILL ENABLE BENEFIT PLANS TO REDUCE THE IMPACT OF FRAUD.

This Court has emphasized that Congress's overriding purpose in enacting ERISA's broad pre-emption provision was to eliminate conflicting or inconsistent state and local regulation of ERISA-covered plans to increase efficiency and reduce the cost of providing benefits,[9] and has recognized that subjecting benefit providers to disparate legal regimes increases the risk that employers will opt not to offer certain benefits to their employees. *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 10 (1987).

This link between cost containment and the increased availability of benefits to employees is a fundamental

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[8] See cases cited and discussed in the petition at 11-12.

[9] *Ingersoll-Rand Co.*, 498 U.S., at 142 ("Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government.").

premise on which Congress structured ERISA's broad pre-emption clause. It makes sense. Reducing the cost of providing benefits makes it more likely that a wider range of benefits will be provided to employees, thereby achieving Congress's ultimate goal in enacting ERISA. By taking this case, clarifying *Mackey*, and reversing the decision of the Oregon Court of Appeals, this Court will further the cost-containment goal in two related respects.

First, a reversal of the Oregon Court of Appeals' decision and repudiation of its narrow construction of the "relates to" language in ERISA § 514(a) will enable benefit providers to contain costs directly by using state-law garnishment procedures to enforce judgments against those who have defrauded them. A growing number of insurers are developing anti-fraud programs in an effort to redress the tremendous losses attributable to health care fraud.[10] Provisions like the Oregon garnishment exemption at issue in this case can deprive a defrauded plan of access to what is often the only source of funds available to recoup the losses caused by the defrauder.

Second, by holding that ERISA pre-empts state laws like the Oregon garnishment exemption, the Court will eliminate the disparities in state law governing the ability of defrauded benefit plans to use existing state-law garnishment procedures. Like the antisubrogation provision of Pennsylvania law that this Court found pre-empted by ERISA in *FMC Corp.* v. *Holliday*, *supra*, varying court rulings on the status of antigarnishment provisions will compel benefit providers to

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[10] In a 1993 survey of 86 insurance companies (representing 65 percent of the commercial insurance market and 14 percent of the Blue Cross/Blue Shield market), HIAA found that 79 percent of the insurers who responded to the survey had developed health care anti-fraud programs. The number of cases investigated by these companies has increased by more than 75 percent since 1990. 1993 HIAA Anti-Fraud Survey.

> "design their programs in an environment of differing State regulations[, which] would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits." 498 U.S., at 60.

This is the risk Congress intended to avoid in enacting ERISA. By granting the petition and reversing the Oregon Court of Appeals' decision, this Court will ensure the uniformity of law essential to effective cost containment and the correlative increase in the availability of benefits to plan beneficiaries.

CONCLUSION

For the foregoing reasons, HIAA respectfully urges this Court to grant the petition and set this case for oral argument.

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